No.

Supreme Court of the United States

October Term, 1971

RICHARD HENRY BERG,

Petitioner,

vs.

CALVIN P. SCHMIDT, as Judge of the Municipal Court of the Orange County Harbor Judicial District, State of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. .....

RICHARD HENRY BERG,

Petitioner,

vs.

CALVIN P. SCHMIDT, as Judge of the Municipal Court of the Orange County Harbor Judicial District, State of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI

This is a petition of Richard Henry Berg for writ of certiorari to review the order made by the United States Court of Appeals for the Ninth Circuit on September 24, 1971, denying petitioner's application for a certificate of probable cause, which certificate of probable cause was sought to review the order made by the United States District Court, Central District of California, on July 29, 1971, denying petitioner's Petition for Writ of Habeas Corpus. The United States District Court, Central District

of California, denied petitioner's application for a certificate of probable cause on August 25, 1971.

OPINIONS BELOW

Petitioner's Petition for Writ of Habeas Corpus filed in the California Supreme Court was denied on April 14, 1971, without comment. To petitioner's knowledge, there are no official or unofficial reports of (a) the Order Denying Petition for Writ of Habeas Corpus filed by the United States District Court, Central District of California, on July 29, 1971 (a copy of said order has been attached hereto as Appendix "C" [Appendix p. 3]); (b) the Order Denying Application for Certificate of Probable Cause filed by the United States District Court, Central District of California, on August 25, 1971 (a copy of said order has been attached hereto as Appendix "D" [Appendix p. 4]); or (c) the Order filed by the United States Court of Appeals for the Ninth Circuit on September 24, 1971 (a copy of said order has been attached hereto as Appendix "E" [Appendix p. 5]).

JURISDICTION

1. Petitioner filed a Petition for Writ of Habeas Corpus[1] in the California Supreme Court challenging the condition of probation that is being challenged in this petition. The California Supreme Court denied the Petition for Writ of Habeas Corpus on April 14, 1971.

---

1. It is established law in California that a condition of probation may be challenged on appeal from the order granting probation or by habeas corpus. *In re Bushman*, 1 Cal.3d 767, 83 Cal.Rptr. 375.

2. The United States District Court, Central District of California, entered its Order Denying Petition for Writ of Habeas Corpus on July 29, 1971. The United States District Court, Central District of California, denied a certificate of probable cause on August 25, 1971. The Order filed by the United States Court of Appeals for the Ninth Circuit denying petitioner's application for a certificate of probable cause was filed on September 24, 1971.

3. No rehearings were requested relative to the instant case, and no orders were requested granting an extension of time within which to petition for certiorari.

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

After pleading guilty to a violation of California Health and Safety Code Section 11530 (possession of marijuana), a misdemeanor, petitioner was placed on probation on certain conditions, one of which conditions required petitioner to "submit to search & seizure and to Nalline and/or urinalysis tests for drugs and narcotics upon request of any officer" (a copy of the docket entry of November 24, 1969, in Case No. F 3637, in the Municipal Court of Newport Beach Judicial District, County of Orange, State of California, setting forth this original condition of probation, has been attached hereto as Appendix "A" [Appendix p. 1]). Subsequently, said condition of probation was modified in the following way: "Defendant ordered to submit his person and property to search and seizure without benefit of warrant, by a peace officer day or night including—but

not limited to—a. residence, b. automobile, c. clothing and personal effects" (a copy of the Amended Probation Order filed in the Municipal Court of Harbor Judicial District, County of Orange, State of California, in Case No. F 3637, has been attached hereto as Appendix "B" [Appendix p. 2]).

The questions presented are:

1. Is the condition of probation as set forth above, both as originally imposed and as modified, unconstitutional and void for the following reasons:

a. Said condition of probation violates the rights guaranteed to petitioner by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, for the reason that petitioner was placed in the position of either accepting said condition of probation and thereby waiving *in futuro* his constitutional right to be free from unreasonable searches and seizures or facing the likely possibility of going to jail;

b. Assuming *arguendo* that said condition of probation is valid, must the search authorized by said condition be interpreted as relating only to the case in which said condition was imposed? In other words, if a search conducted pursuant to said condition of probation revealed contraband, may the discovery of contraband only be used to violate petitioner's probation in the case in which said condition was imposed and, to the contrary, may said condition of probation, consistent with the provisions of the United States Constitution, be construed as a future waiver by petitioner of his search and seizure rights as related to new and different criminal cases?

STATUTES INVOLVED

Amendment IV to the United States Constitution provides in its pertinent parts as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . . . "

Amendment V to the United States Constitution provides in pertinent part as follows:

> " . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . . "

Amendment XIV to the United States Constitution provides in pertinent parts as follows:

> " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . . "

STATEMENT

On or about November 24, 1969, in Case No. F 3637, in the Municipal Court of the Orange County Harbor Judicial District (formerly known as the Newport Beach Judicial District), State of California, petitioner pled guilty to a violation of California Health and Safety Code Section 11530 (a misdemeanor). As a result of said conviction, petitioner was placed on summary probation pursuant to specified conditions, one of which conditions required petitioner to "submit

to search and seizure and to Nalline and/or urinalysis tests for drugs and narcotics upon request of any officer."

On or about October 23, 1970, and November 17, 1970, respectively, police officers of the City of Newport Beach, County of Orange, State of California, conducted searches of petitioner's residence. These searches were conducted solely and exclusively on the basis of the condition of probation that had been imposed on petitioner in Case No. F 3637 as above set forth. At the time of each of said searches the police officers possessed no search or arrest warrant, did not have probable cause to arrest petitioner, and did not have petitioner's consent to search his residence. Absent the condition of probation imposed in Case No. F 3637 as above set forth, said police officers would have had no justification, legal or otherwise, for conducting either of said searches at petitioner's residence.

Since November 17, 1970, petitioner has been subjected to one other search by members of the Newport Beach Police Department, which search was purportedly based upon the condition of probation imposed in Case No. F 3637. Petitioner has every reason to believe that he will be subjected to further searches and seizures of his person and residence based upon no other justification than the condition of probation imposed upon petitioner in said Case No. F 3637.

On June 15, 1971, the above referred to condition of probation was amended to read as follows: "Defendant ordered to submit his person and property to search and seizure without benefit of warrant, by a peace officer day or night including—but not limited to—a residence,

b. automobile, c. clothing and personal effects."

PROCEDURAL BACKGROUND

On or about November 24, 1969, in Case No. F 3637, in the Municipal Court of the Orange County Harbor Judicial District, State of California, petitioner pled guilty to a violation of California Health and Safety Code Section 11530. As a result of said conviction, petitioner was placed on summary probation pursuant to certain specified conditions, one of which conditions required petitioner to "submit to search and seizure and to Nalline and/or urinalysis tests for drugs and narcotics upon request of any officer." Petitioner did not appeal from the judgment imposing said condition of probation. However, both California and federal cases hold that a person does not waive his right to challenge a condition of probation by accepting probation on the terms and conditions imposed by the court. See *Worcester v. C.I.R.*, 370 F.2d 713; *People v. Blakeman*, 170 Cal.App.2d 596, 339 P.2d 202. In *Blakeman*, the court stated:

> "Plaintiff further contends that defendant waived the right to urge the invalidity of the banishment clause [the condition of probation challenged] by suggesting banishment and receiving the benefit of the probation which was conditioned upon banishment: The fallacy of this argument is that we are not dealing with a right or privilege conferred by law upon the litigant for his sole personal benefit. We are concerned with a principle of fundamental

public policy. The law cannot suffer the State's interest and concern in the observance and enforcement of this policy to be thwarted through the guise of waiver of a personal right by an individual. 'Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.'

" . . . 'Although a defendant may waive rights which exist for his own benefit, he may not waive those which belong also to the public generally.' . . . A defendant may waive formalities established for his protection but not that which is essential to a valid judgment. . . . " (339 P.2d 202, 203.)

See also *People v. Dominguez*, 256 Cal.App.2d 623, 64 Cal. Rptr. 290; *People v. Stanworth*, 71 Cal.2d 820, 80 Cal.Rptr. 49; *In re Bushman*, 1 Cal.3d 767, 83 Cal.Rptr. 375.

After it appeared to petitioner that said condition of probation was going to be used by law enforcement officers to conduct searches of petitioner's person and residence at any time said law enforcement officers, in their unbridled discretion, decided to do so, petitioner filed a Petition for Writ of Habeas Corpus in the California Supreme Court challenging said condition of probation. The California Supreme Court denied the Petition for Writ of Habeas Corpus on April 14, 1971.

Thereafter, petitioner filed a Petition for Writ of Habeas Corpus challenging said condition of probation in the United States District Court, Central District of California. Said Petition for Writ of Habeas Corpus was denied on July 29,

1971, and the District Court entered its Order Denying Application for a Certificate of Probable Cause on August 25, 1971. Thereafter, petitioner applied to the United States Court of Appeals for the Ninth Circuit for a Certificate of Probable Cause, which Certificate of Probable Cause was denied by the Ninth Circuit on September 24, 1971.

Petitioner respectfully submits that both the United States Court of Appeals for the Ninth Circuit and the United States District Court, Central District of California, unjustifiably and arbitrarily denied petitioner's Application for Certificate of Probable Cause. To the extent that the existence of a Certificate of Probable Cause is a prerequisite to this Court assuming jurisdiction of the instant Petition for Writ of Certiorari, petitioner hereby respectfully applies to this Court for a Certificate of Probable Cause. *Cf. Fay Noia,* 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837.

ARGUMENT

So far as counsel for petitioner is able to determine, this case presents to this honorable Court for the first time questions which have not been, but should be, settled by this Court. In particular, this case involves the question of whether a court may require a criminal defendant to surrender *in futuro* his constitutional right to be free from unreasonable searches and seizures in exchange for a grant of probation. For the reasons hereafter set forth, it is respectfully submitted that said condition of probation, both as originally imposed and as amended, is unconstitutional and void and should be so declared by this Court. In addition, this Court should

direct respondent to modify its summary probation order by striking therefrom the said condition of probation

It is hardly necessary to be a constitutional law scholar to know that one of the primary evils at which the Fourth Amendment to the United States Constitution was directed was the general warrant. This type of warrant was aptly described by this Court in *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134, in the following way:

> "The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the Writs of Assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required. . . . . " (361 U.S. 98, 100.)

The Fourth Amendment exists for an equally important reason, to wit, to insure the right to privacy of the individual citizen (*Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576) and, absent emergency situations, to assure that, before the individual's right to privacy is violated by searches and seizures conducted by law enforcement officers, the conduct of the law enforcement officers is subjected to judicial scrutiny. This salutary principle of constitutional law was probable best set forth in *McDonald v. United States*, 335 U.S. 451, 65 S.Ct. 191, 93 L.Ed. 15, wherein this Court stated:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent

> some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade the privacy in order to enforce the law. The right of privacy is deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

Only recently this Court has had occasion to re-affirm the principles enunciated in *McDonald*. Thus, in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, the Court stated:

> ". . . We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances . . . ." (392 U.S. 1, 20.)

The applicability of the above-stated rules to the instant

case is at once apparent. Thus, it is clear that the condition of probation imposed upon petitioner not only has resulted in petitioner waiving a sacred constitutional right (i.e., the right to be free from unreasonable searches and seizures) *in futuro* but may also result in petitioner being subject to searches of his person and residence at any time by any law enforcement officer without the requirement of warrants, consent or probable cause. Indeed, it may be wondered if there is much difference between this condition of probation and the dreaded general warrant.

When it is also considered that if petitioner had rejected this condition of probation he undoubtedly would have been incarcerated, the true insidiousness of the condition imposed becomes even more apparent. To give a man the choice of being incarcerated or waiving *in futuro* a precious constitutional right is, in fact, to give him no choice at all. At the time petitioner was given the choice of accepting probation on the court's terms or going to jail, there can be no doubt that petitioner's bargaining position was almost non-existent. In effect, the relationship between the court and petitioner was very similar to the relationship between two contracting parties in a situation where one of the contracting parties has a far superior bargaining position than the other. Agreements where one party's bargaining position is far superior to the other are often described as contracts of "adhesion." It is respectfully submitted that the relationship between the court and petitioner at the time the court was about to impose sentence upon petitioner was identical to the relationship of persons involved with a contract of "adhesion." In this connection, the Court's attention is respectfully directed to *Blair v. Pitchess*, 5 Cal.3d 258, wherein the California Supreme

Court stated that a consent obtained in a contract of "adhesion" is not effective to waive a person's constitutional protection against unreasonable searches and seizures.

With respect to the issue here under discussion, the case of *Worcester v. C.I.R.*, 370 F.2d 713, is most pertinent. In *Worcester*, the court had the occasion to pass upon the situation wherein the federal district judge offered to place the defendant on probation if he waived his right of appeal. Even though the defendant accepted the court's terms, the First Circuit Court of Appeals held that it was impermissible for the District Court to condition a grant of probation upon the waiver by the defendant of his right to appeal. In this connection, the First Circuit Court stated:

> "The court was without right to bargain thus with the defendant, or to put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. Just as it is unfair to handicap him because of his poverty (citations omitted), it is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice. . . . It is no answer to say that the defendant need not accept the court's 'offer'. The vice is that vis-a-vis the court he is in an unequal position.
>
> "Were the rule otherwise, we could only too readily envisage the possibilities of abuse. A judge who fears he has committed reversible error during the trial, and does not like the thought of being reversed, informs the defendant that he is considering a

> substantial sentence, but that if the defendant will demonstrate his repentance, or his good citizenship, by waiving appeal, he will suspend it.
>
> " . . . Furthermore, we cannot try the mind of the judge, to assess whether his motives in offering the defendant a valuable consideration to waive appeal (and we can think of little more valuable than not going to jail) were good or bad. To use the power of sentencing to obtain an undertaking to which the court was not entitled would necessarily be a misuse of that power." (370 F.2d 713, 718.)

It is significant to note that in *North Carolina v. Pearce*, 395 U.S. 711, 724, 89 S.Ct. 2072, 23 L.Ed.2d 656, this Court cited with approval and quoted from the decision in *Worcester*, *supra*.

It is conceded by petitioner that the grant of probation is a privilege and not a right. However, it is respectfully submitted that the rule enunciated in *Worcester*, *supra*, is, by analogy, applicable in the instant case. Thus, can it be said that a man who is asked to choose between going to jail or waiving his Fourth Amendment rights (as in the instant case) is faced with any less a "Hobson's Choice" than the man who is asked to choose between going to jail and giving up his right of appeal (as in *Worcester*)?

In this connection, it has become a standard rule of constitutional law that a state may not condition the availability of even a gratuitous benefit upon the waiver of a constitutional right. See, *e.g.*, *Sherbert v. Verner*, 374 U.S. 98, 83 S.Ct. 1790, 10 L.Ed.2d 965; *Frost and Frost Trucking Co. v. Railroad Commission of the State of California*, 274 U.S. 583,

46 S.Ct. 605, 70 L.Ed. 1101.

As if the original condition of probation imposed upon petitioner was not bad enough, as indicated above, the court modified said condition of probation on June 15, 1971. In light of the Amended Probation Order, it may seriously be doubted whether there is anything left of this petitioner's constitutional right to privacy. *Katz v. United States, supra.* Pursuant to the provisions of said Amended Probation Order, it now appears that a search may be conducted of petitioner's person and property at any time of the day or night, with or without a warrant, at the whim and caprice of any peace officer. It is not overstating the case to say that the framers of our Constitution would be horrified to learn that the despised general warrant, for so many years thought dead, has been reincarnated in the Municipal Court of the Orange County Harbor Judicial District in the form of an onerous condition of probation. In this connection, the following language taken from this Court's recent decision in *Coolidge v. New Hampshire*, ... U.S. ....., 91 S.Ct. ....., 29 L.Ed.2d 564, 575, is appropriate.

> " 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound

than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'" (29 L.Ed.2d 564, 575.)

In the event this petition is wrongly denominated, it is respectfully prayed that this Court consider the petition as a Petition for Writ of Habeas Corpus.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the condition of probation imposed upon petitioner in Municipal Court Case No. F 3637, both as originally imposed and as amended, is unconstitutional. The attempt by the Municipal Court in said case to remove the magistrate from his position between the police officer and the private citizen and to leave the decision to search the petitioner to the unbridled discretion of a police officer, without probable cause and without warrant, must not be permitted to succeed. It is indeed staggering that the despised general warrant, for so many years thought dead, has been brought back to life in the Orange County Municipal Court in the form of an insidious condition of probation.

Respectfully submitted,

HARVEY A. SCHNEIDER

Attorney for Petitioner

Of Counsel

RICHARD P. B. TYSON

APPENDIX

Page

Appendix "A"
Copy of the order made by the Municipal Court of the Orange County Harbor Judicial District, County of Orange, State of California, on November 24, 1969, imposing the original condition of probation on petitioner 1

Appendix "B"
Copy of the Amended Probation Order as made by the court on June 15, 1971 2

Appendix "C"
Order Denying Petition for Writ of Habeas Corpus entered by the United States District Court, Central District of California, on July 29, 1971 3

Appendix "D"
Order Denying Application for a Certificate of Probable Cause filed by the United States District Court, Central District of California, on August 25, 1971 4

Appendix "E"
Order made by the United States Court of Appeals for the Ninth Circuit on September 24, 1971, denying petitioner's Application for a Certificate of Probable Cause 5

APPENDIX "A"

DOCKET ENTRY OF NOVEMBER 24, 1969

In the Municipal Court of Newport Beach Judicial District, County of Orange, State of California.

No. F 3637

THE PEOPLE OF THE STATE OF CALIFORNIA, vs. RICHARD HENRY BERG.

Nov 24 1969 Cause called for Preliminary Examination. Calvin P. Schmidt, Judge presiding. Both sides ready. People represented by J. Lang, Deputy District Attorney. Defendant in court and represented by R. Tyson, Attorney. Reporter R. Clark present.

Motion of people to strike the word felony and add the word misdemeanor in the fourth line and motion to strike the word feloniously in the eighth line. Motion granted.

Leave of court first obtained defendant now withdraws plea of not guilty heretofore entered and pleads guilty thereto.

Defendant personally waives time for sentence.

The said defendant having been convicted of the offense of 11530 H&S the court now orders . . . that said defendant be placed on summary probation for a period of 3 years upon the following terms and conditions:

1. Violate no law & report in writing immediately to this Court any violation—except parking tickets.

2. Submit to search & seizure and to Nalline and/or urinalysis test for drugs and narcotics upon request of

any officer.

3. Pay $200. + $50 P.A. or serve one day for each $10.00 not paid.

■ ■ ■

APPENDIX "B"

AMENDED PROBATION ORDER

In the Municipal Court of Harbor Judicial District, County of Orange, State of California.

Case No. F 3637

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. RICHARD HENRY BERG, Defendant.

It appearing that on 11-24-69 an Order was made in the above entitled action, placing the above named Defendant on Probation for the term of 3 years, and it appearing to Court that the Order should at this time be amended; IT IS THEREFORE ORDERED THAT condition No. 2 be redefined as follows:

Defendant ordered to submit his person and property to search and seizure without benefit of warrant, by a peace officer day or night including—but not limited to—

a. residence
b. automobile
c. clothing and personal effects.

IT IS FURTHER ORDERED that the original Order, except as hereinabove amended, shall remain in full force and effect.

Dated 6-15-71

CALVIN P. SCHMIDT

Judge.

■ ■ ■

APPENDIX "C"

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

In the United States District Court, Central District of California.

Civil No. 71-1346-CC

RICHARD HENRY BERG, Petitioner, v. CALVIN P. SCHMIDT, ETC., Respondent.

[FILED JULY 29, 1971]

Petitioner seeks a writ of habeas corpus claiming that his amended probation order of the Municipal Court of Orange County contains an invalid provision, namely, that defendant is required to submit his person and property to search and seizure without a warrant by a peace officer, day or night.

Petitioner pleaded guilty to a charge of possession of marihuana which resulted in the probation order.

California Penal Code, Section 1203.1, provides that "The court may impose and require any or all of the above-mentioned terms of imprisonment, * * * and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, * * * and specifically for the reformation and rehabilitation of the probationer * * * ."

California courts have upheld similar conditions of probation and in particular the requirement that a defendant consent to search by a Probation Officer or a Peace Officer. See *People v. Kern*, 71 Cal.Rptr. 105 (1968); *People v. Fitzpatrick*, 84 Cal.Rptr. 78 (1970); *People v. Mason*, 92 Cal.Rptr. 628 (1971).

IT IS, THEREFORE, ORDERED that the petition for a writ of habeas corpus be, and hereby is, denied.

DATED: This 29th day of July 1971.

CHARLES H. CARR
United States District Judge

■ ■ ■

APPENDIX "D"

ORDER DENYING APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE

In the United States District Court, Central District of California.

Civil No. 71-1346-CC

RICHARD HENRY BERG, Petitioner, v. CALVIN P. SCHMIDT, ETC., Respondent.

[FILED AUGUST 25, 1971]

Petitioner seeks a certificate of probable cause without setting forth any grounds to support such application. Petitioner merely asserts that he has been deprived of "federal constitutional rights."

For the reasons set forth in this court's order filed July 29, 1971, and because it appears that the application is without merit and is frivolous,

IT IS ORDERED that the application for a certificate of probable cause be, and hereby is, denied.

DATED: This 25th day of August 1971.

CHARLES H. CARR
United States District Judge

■ ■ ■

APPENDIX "E"

ORDER

In the United States Court of Appeals, for the Ninth Circuit.

Misc. 5882

RICHARD HENRY BERG, Petitioner, vs. CALVIN P. SCHMIDT, Judge, Municipal Court of the Orange County Harbor Judicial District, State of California, Respondent.

[FILED SEPTEMBER 24, 1971]

Petitioner, a California state parolee, seeks a certificate of probable cause for appeal following adverse orders of the district court entered on July 29, 1971, denying a petition for a writ of habeas corpus and on August 25, 1971, denying an application for a certificate of probable cause.

The application is denied for the reasons expressed by Judge Carr in the above orders.

RICHARD H. CHAMBERS
United States Circuit Judge

• • •

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on OCTOBER 22 1971, I served the within PETITION FOR WRIT OF CERTIORARI (RICHARD HENRY BERG v. CALVIN P. SCHMIDT) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

CLERK, MUNICIPAL COURT OF
HARBOR JUDICIAL DISTRICT
567 WEST EIGHTEENTH STREET
COSTA MESA, CALIFORNIA 92626 [1 copy]

ATTORNEY GENERAL OF THE STATE OF CALIFORNIA
600 STATE BUILDING
LOS ANGELES, CALIFORNIA 90012 [2 copies]

DISTRICT ATTORNEY OF COUNTY OF ORANGE
700 CIVIC CENTER DRIVE WEST
SANTA ANA, CALIFORNIA 92701 [1 copy]

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543 [3 copies]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCTOBER 22nd 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Stapdefer

Dean-STandefer Co., 322 Main St., Huntington Beach, Ca.
(714) 536-7161

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-593

RICHARD HENRY BERG,

Petitioner,

vs.

CALVIN P. SCHMIDT, as Judge of the Municipal Court of the Orange County Harbor Judicial District, State of California,

Respondent.

Answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-593

RICHARD HENRY BERG,

Petitioner,

vs.

CALVIN P. SCHMIDT, as Judge of the Municipal Court of the Orange County Harbor Judicial District, State of California,

Respondent.

Answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Statement of the Case.

On November 24, 1969, in Case No. F-3637 in the Municipal Court of the Orange County Harbor Judicial District, Petitioner upon a plea of guilty to a violation of California Health and Safety Code Section 11530, a Misdemeanor, was granted probation on condition that he "submit to search and seizure upon request of a police officer."

On October 23, 1970, officers of the Newport Beach Police Department, having received information that Petitioner was again dealing with narcotics, went to Petitioner's residence and searched it in reliance upon

the condition of probation. On November 17, 1970, Officer Epstein of the Newport Beach Police Department returned to the residence once more and in reliance on the condition of probation sought and obtained consent to search. In both instances the search revealed numerous items of contraband. In both instances Petitioner was held to answer and was charged by information with several felonies.

In both instances, the California Superior Court suppressed the evidence and dismissed the actions because the condition of probation was too narrow to allow for a search of the residence. The specific facts and findings in the cases are to be found in the records of the California Superior Court of Orange County entitled "*People v. Henry Berg*, No. C-24853" and "*People v. Henry Berg*, No. C-24856."

Subsequently, the Municipal Court of Orange County Judicial District modified the condition of Petitioner's probation to require Petitioner to submit his residence, property and person to search and seizure upon request of any peace officer at any time of the day or night.

Petitioner appealed the modified condition of probation to the Appellate Department of the Orange County Superior Court. The Appellate Department denied the appeal and Petitioner filed for a Writ of Habeas Corpus in the United States District Court, Central District of California. That Court denied the Petition as did the United States Circuit Court of Appeals for the Ninth Circuit.

Questions Presented.

I. Whether California Penal Code Section 1203.1 which provides that the Court may as part of its sentence impose and require "any or all of the above-mentioned terms of imprisonment . . . and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done . . . and specifically for the reformation and rehabilitation of the probationer", was unconstitutionally applied by conditioning Petitioner's probation on the requirement that he submit his person, his property and his home to search and seizure upon request by a police officer at any time of the day or night.

II. Whether contraband found pursuant to a search conducted under authority of a waiver of search and seizure rights in return for receiving the privilege of probation can be used as evidence.

ARGUMENT.

I.

Probation Is a Privilege Which a Defendant Has the Right to Refuse, and a Condition of Probation Is Proper so Long as It Is Reasonable and Relevant to the Offense for Which Probation Is Granted.

California Sentencing statutes, subject to specific statutory limitations, allow the Court to suspend the sentence and to place the defendant on probation for a certain period of time on condition that he perform or refrain from performing certain acts. The conditions imposed, to be valid, must be reasonably related to controlling the particular type of criminality to which the defendant, though his conviction, has shown himself to be prone. Thus the Court in *In re Peeler*, 266 Cal.App.2d 483; 488, sets forth the *purpose* of the probationary period as follows:

> "'An integral and important part of the penological plan of California is the discretionary retention in the trial court of jurisdiction over the defendant and the cause of action against him in a large area of crimes by virtue of the probation procedures.' (*People v. Banks* (1959) 53 Cal.2d 370, 383 [1 Cal.Rptr. 669, 348 P.2d 102]) . . .
>
> "The purpose of probation is rehabilitation; and the considerations which influence the granting of it are stated only in the most general terms: 'If the court shall determine that there are circumstances in mitigation of punishment prescribed by law, or that the ends of justice would be subserved by granting probation to the defendant, that court shall have power in its discretion to place the defendant on probation. . . .' (P. C. 1203.)"

In setting forth the scope of the court's discretion concerning the type of conditions the court may impose, *In re Peeler, supra*, goes on to state:

> The judge, notwithstanding a wide discretion vested in him, must consider each application for probation upon its merits. (*People v. Rojas* (1962) 57 Cal.2d 676 [21 Cal.Rptr. 564, 371 P.2d 300].) "Moreover, the determination to grant or deny probation is also one in which the state, as well as the defendants, has an interest within the statutory declarations." (Id. p. 683.) Although the discretion of the trial court in granting probation, and imposing the conditions of probation and in revoking or modifying those conditions (see below) is wide, its powers are not boundless. *Conditions imposed must be reasonable and relevant to the offense for which probation is being granted.* (Emphasis added.)

The same principles set forth above were enunciated by the California Supreme Court in *People v. Mason*, 5 Cal.3d 759, 764, where the court goes on to point out that the defendant has the right to accept or refuse probation. The court states:

> Turning to the question of the validity of the condition as we have interpreted it, we are guided by the principles set forth in *In re Bushman, supra*, 1 Cal.3d 767, 776-777, as follows: "When granting probation, courts have broad discretion to impose restrictive conditions to foster rehabilitation and to protect public safety. Penal Code section 1203.1 authorizes the court to impose any reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, . . . and specifically for the reformation and

> rehabilitation of the probationer." If the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence. [Citations.] In such case he may challenge the legality of any proposed conditions of probation on an appeal from the judgment or on habeas corpus." [Citations.]

In conformity with the above authorities the California Courts have held that where as here a defendant has been found guilty of either possession or sale of narcotics or dangerous drugs, the conditioning of a defendant's probation to a requirement that defendant submit to search and seizure is reasonably related to the crime, reasonably designed to avoid future criminality and constitutionally valid. As pointed out in *People v. Mason*, *supra*, at p. 764:

> It seems beyond dispute that a condition of probation which requires a prior narcotics offender to submit to a search meets the test set forth in *Bushman*, since that condition is reasonably related to the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses. Indeed, the cases have held that such a condition is reasonable and valid, being "related to [the probationer's] reformation and rehabilitation in the light of the offense of which he was convicted." (*People v. Kern*, *supra*, 264 Cal.App.2d 962, 965; see *People v. Fitzpatrick*, 3 Cal.App.3d 824, 827 [84 Cal. Rptr. 78]; *cf. People v. Oslo*, 50 Cal.2d 75, 103 [323 P.2d 397]; *People v. Williams*, 247 Cal. App.2d 394, 403-404 [55 Cal.Rptr. 550].)

Worcester v. C.I.R., 370 F.2d 713 is of no consequence here since, unlike a condition requiring submission to search and seizure, a condition prohibiting appeal is in no way related to the crime and can in no way further the rehabilitation of a defendant.

II.

Requiring a Defendant to Give Up His Fourth Amendment Rights in Return for Receiving the Privilege of Probation Is Not Unconstitutional.

Petitioner was granted probation on condition that he submit to search and seizure at any time. He was granted a privilege in return for the waiver of one of his rights. The question can thus be restated as follows: Can the court require the waiver of certain constitutional rights in return for the granting of the privilege of probation?

The California Appellate Court in *People v. Williams* (1966), 247 Cal.App.2d 394, 55 Cal. Rptr. 550, concluded in the affirmative. There the defendant had alleged the unconstitutionality of requesting restitution as a condition of probation. After a thorough review of the authorities the court stated:

> From the foregoing it is concluded that the discretion to be exercised in imposing *conditions of probation is not bounded by constitutional limitations*, but by the terms of the statute which authorizes the grant of probation and the public policy of that jurisdiction. (See *Escoe v. Lerbst*, 295 U.S. 490; *Burns v. United States*, 287 U.S. 216) *id.* pp. 307-408.) (Emphasis added)

The reasoning of *Williams*, *supra*, was adopted in *People v. Kern*, 264 Cal.App.2d 962, where the court

specifically upheld a condition of probation similar to that here involved. There the court went on to say:

> "Defendant was granted probation upon condition, among others, that he use no narcotics; associate with no known narcotic users; violate no laws; and submit his person and property to search and seizure at any time of the day or night by any law enforcement officer with or without a warrant. He contends the latter condition is unreasonable and should be stricken.
>
> "In granting probation a court may impose such 'reasonable conditions, as it may determine are fitting and proper for reformation and rehabilitation of the probationer.' (Penal Code Section 1203.1)
>
> "Imposition of the condition that defendant submit to a search by law enforcement officers at any time as a condition to probation does not present a constitutional question. (*People v. Williams*, 247 Cal.App.2d 394, 407, 55 Cal.Rptr. 550)"

In explaining the rationale sustaining the validity of the waiver of a constitutional privilege the court in *Williams, supra*, held that:

> "The answer to this argument is that probation is a matter of grace and cannot be demanded of right, and, whatever may be the rule under other statutes, under our law it is expressly provided that no one shall be put on probation except with his consent. Thus appellant was given the privilege of probation upon certain conditions which he voluntarily accepted.

That same rationale is set forth in *People v. Mason*, 5 Cal.3d 759 where the Court states:

> It should be kept in mind that although the scope of the search in the instant case may have exceeded the permissible limits announced in *Chimel v. California, supra*, 395 U.S. 752, that case acknowledged the existence of "well recognized exceptions" to the general rule requiring a warrant in order to conduct a house search. (P. 763 [23 L.Ed.2d 694].) One of those exceptions, referred to in *Katz v. United States*, 389 U.S. 347, 358, footnote 22 [19 L.Ed.2d 576, 586, 88 S.Ct. 507], is that "A search to which an individual consent meets Fourth Amendment requirements. *Zap v. United States*, 328 U.S. 624. . . ." (See also *Vale v. Louisiana*, 399 U.S. 30, 35 [26 L.Ed.2d 409, 413, 90 S.Ct. 1969].) The *Zap* case is controlling here, for it upheld the validity of an *advance* waiver of Fourth Amendment rights akin to the provisions of the probation condition before us.

The California probationary aim, when analyzed, is thus similar in structure and scope with that set forth in 18 U.S.C. §3651. And in California as in the Federal Court the granting of probation and the conditions upon which it is granted are matters purely within the discretion of the court having jurisdiction over the convicted defendant (*Cf. e.g. Trueblood Longknife v. United States*, (C.A. Hawaii 1967) 381 F.2d 17 *cert. den.* 390 U.S. 131, 100 L.Ed. 1013.)

In *Toyosaburo Korematsu v. United States*, 319 U.S. 432, 433, 87 L.Ed. 1497, 1498, this Honorable Court described the *status* of a probationer as follows:

> The probationary surveillance is the same whether or not sentence is imposed. In either case, the probation order follows a finding of guilt or a plea of nolo contendere. Thereafter, the defendant must abide by the orders of the court. He must obey the terms and conditions imposed upon him, or subject himself to a possible revocation or modification of his probation; and under some circumstances he may, during the probationary period, be required to pay a fine, or make reparation to aggrieved parties, or provide for the support of persons for whom he is legally responsible. 18 U.S.C.A. §724, 7 F.C.A. title 18, §724. He is under the "supervision" of the probation officer whose duty it is to make reports to the court concerning his activities. 18 U.S.C.A. §727, 7 F.C.A. title 18, §727, and at "any time within the probation period the probation officer may arrest the probationer, wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest." 18 U.S.C.A. §725, 7 F.C.A. title 18, §725. These and other incidents of probation emphasize that a probation order is "an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline." *Cooper v. United States*, (C.C.A. 5th) 91 F.2d 195, 199.

It is axiomatic that Fourth Amendment immunity may be waived in advance of a specific search. Within limits there may be a waiver general as to time of

search for searches to be made by certain public officials. (*Zap v. United States*, 328 U.S. 624 [90 L.Ed. 1477, 66 S.Ct. 1277]; *Bowles v. Miste*, 64 F.Supp. 835; *Bowles v. Curtiss Candy Co.*, 55 F.Supp. 527, 531; *United States v. Rabicoff*, 55 F.Supp. 88; *Tucker v. State*, 244 Md. 488, [224 A.2d 111], cert. denied 386 U.S. 1024 [18 L.Ed.2d 463, 87 S.Ct. 1381]; *People v. Allen*, 407 Ill. 596 [96 N.E.2d 446], cert. denied 341 U.S. 922 [95 L.Ed. 1355, 71 S.Ct. 739]; *Zukowski v. State*, 167 Md. 549 [175 Atl. 595].)

In *Zukowski v. State*, *supra*, the court stated, at page 597: "The search which resulted in the discovery of the defendant's illegal possession of liquor was made with his consent voluntarily and formally given, under the terms of the statute, to induce the issuance of a license to him for the sale of alcoholic beverages. The consent was none the less voluntary because of the fact that it was a prerequisite to his obtaining the license. In thus authorizing the search he debarred himself from contending successfully that it was unlawful."

Such waivers are usually with regard to licensees in businesses made subject to search by statute.

Given the above propositions, it cannot honestly be argued that the Constitution of the United States *prohibits* the conditioning of a grant of probation upon relinquishment of Fourth Amendment rights. Chief Justice Hughes in *Burns v. United States*, 287 U.S. 216, 221-222, 77 L.Ed. 266, 268-269 properly sets forth the discretionary power of the sentencing court and states:

> Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement

> that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case; to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, when satisfied "that the ends of justice and the best interests of the public, as well as the defendant, will be subserved," to suspend the imposition or execution of sentence and "to place the defendant upon probation for such period and upon such terms and conditions as they may deem best."

The *purpose* of an act allowing probation is thus clear, and *Burns, supra,* aptly states:

> He is still a person convicted of an offense, and the suspension of his sentence remains within the control of the court. The continuance of that control, apparent from the terms of the statute, is essential to the accomplishment of its beneficent purpose, as otherwise probation might be more reluctantly granted or, when granted, might be made the occasion of delays and obstruction which would bring reproach upon the administration of justice.

If, as in cases involving the trafficking of contraband a waiver of Fourth Amendment rights is *necessary* to maintain the *control* described by Chief Justice

Hughes in *Burns*, *supra*, the sentencing court cannot be said to have abused its discretion by in effect telling a defendant: "You have a choice. You can go to jail or you can give up certain constitutional immunities." And, once the defendant has accepted the benefit of probation he cannot be heard to complain of the burden imposed by its conditions. As pointed out by the Supreme Court of California in *Mason*, if and *when* the Search and Seizure condition is arbitrarily used by police officers the courts can correct the abuses.

Moreover, to argue that the giving up of a right in return for a privilege is unconstitutional is to avoid reality. Every day, in every walk of life, people are giving up constitutionally protected rights in return for certain privileges. Thus, for example, those working for the federal government pay for their privilege by giving up their right to work to elect the candidates of their choice. Those who work for any state government or for the federal government give up their right to strike in return for the privilege. More important, *every* condition of probation, if analyzed, constitutes a violation of a constitutional right. A jail sentence imposed as a condition of probation violates a defendant's right to personal freedom. A condition requiring a probationer to work at a specific place violates another of defendant's fundamental rights. A condition that defendant not frequent certain places or persons, or that he not hold certain positions violate still other rights. . . . Yet *all* of these conditions have been considered proper if they are reasonably related to the crime involved in the conviction and are reasonably designed to curb future criminal activities (*cf. People v. Osslo*, 50 Cal.2d 75, 127; *People v. Williams*, *supra*). And the requirement that probationer report

monthly has been considered as implying a valid waiver of a probationer's rights under *Miranda v. Arizona*, 384 U.S. 436. (*People v. Hamilton*, 260 Cal.App.2d 103.) And *People v. King*, 267 Cal.App.2d 814, 823, *cert. den.* 90 S.Ct. 576, 396 U.S. 1028, 24 L.Ed.2d 514 found proper a condition of probation limiting the defendant's constitutional right to assembly and stated:

> A reading of the record makes the purpose of the disputed condition obvious. Since defendant was guilty of crimes growing out of a demonstration and had suffered a prior conviction arising out of one, it was not improper that restraint was placed on such activity.

III.

Waiver of Immunity From Search and Seizure Renders the Evidence Admissible in Any Proceeding.

While the issue of whether evidence found through a search conducted pursuant to a condition of probation waiver of search and seizure rights is admissible evidence of the commission of a new and different crime is not properly before the Court because not in issue in this case, Respondent submits that Petitioner's hinted-at argument that the evidence so obtained should not be made admissible in the prosecution of a new and different crime is not well founded. Respondent respectfully advocates the application of the familiar rule that probable cause for search exists whenever there is probable cause for an arrest. In the case of a probationer, probable cause for an arrest is supplied by suspicion plus knowledge that the person is on probation (See California Penal Code 1203.2; *cf. People v. Osslo*, 51 Cal.App.2d 380; *People v. Heuz*, 253 Cal.App.2d 986) and by analogy, knowledge of the

existence of a search and seizure condition of probation is thus sufficient to give the officers probable cause to search the probationer. Evidence so obtained is legally admissible for all purposes. To hold otherwise would in fact nullify the condition since *illegally* seized evidence is admissible in all probation revocation hearings regardless of whether the condition concerning search and seizure has been imposed or not.

For all the above reasons, Respondent urges This Honorable Court to deny the Petition.

Dated this 9th day of February, 1972.

Respectfully submitted,

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